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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

RICHARD S. SCHWEIKER, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

JOHN BROZ, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR RESPONDENTS

OF COUNSEL:

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of Alabama
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QUESTIONS PRESENTED

Whether the provisions of 20 C.F.R. §404, subpart P, Appendix 2 (1981) relating to age and one's ability to adapt to a new job as applied to respondents claims sub judice were violative of petitioner's rule-making powers under the Social Security Act, 42 U.S.C. §§401 et seq?

PARTIES TO THE PROCEEDINGS

Richard S. Schweiker, Secretary of Health and Human Services; Petitioner; John Broz, Richard D. Holmes, Corrine Little, Thomas O. Jones and Fred Soesbe; Respondents.

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Respondents do not dispute petitioner's recitation of the OPINIONS BELOW, JURISDICTION, STATUTE AND REGULATIONS INVOLVED, and statement as set forth in its brief and, accordingly, by reference adopt same herein.

REASONS FOR DENYING THE PETITION

Respondents[1] strongly disagree with petitioner's position in brief that the issue presented here and that presented in Schweiker v. Campbell, Docket No. 81-1983[2] are "substantially similar" and that the decisions below[3], "share the common

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[1]Counsel for respondents Little, Jones, and Soesbe, Messrs. Salmon, McCleave, and Simon, respectively, have authorized this writer and counsel for respondent Broz to present their position with respect to this petition. Attempts to contact counsel for respondent Holmes have not met with success.

[2]Schweiker v. Campbell, cert. granted, No. 81-1983 (June 21, 1982), sub'd on oral arguments Feb. 28, 1983, 51 U.S. L.W. 3648.

[3]Schweiker v. Broz, 677 F.2d 1351 (11th Cir. 1982); Campbell v. Schweiker, 665 F.2d 48 (2nd Cir. 1981).

conclusion that the Social Security Act somehow precludes the Secretary from declaring in regulations the effect that non-medical factors should have on the evaluation and disability." (Petitioner's Brief at 6, 7).

Campbell, supra, confined itself exclusively to that portion of 42 U.S.C. §423(d)(2)(A) relating to "work...in the national economy" and, more specifically, lists of occupations promulgated by the Secretary viz-a-viz his rule making power and which are judicially/administratively noticed in conjunction with disability claims.[4] In the case at bar, the Eleventh Circuit ruled that the foregoing list of occupations and the conclusory weight given same by ALJs was not an abuse of the Secretary's rule making powers in that, "...they refrained from determining what are fairly classified as adjudicative facts." With that, the Eleventh Circuit concluded that; "'[t]he second element [whether there are a substantial number of jobs in the national economy that a person with certain characteristics can perform] looks to conditions of the national job market. It is concerned with broad sociological data that is not related to the individual parties. It therefore concerns non-adjudicative matters." (Emphasis supplied).

Indeed, the decision below to the extent this Court is asked to issue a writ of certiorari, confined itself exclusively to the factor of age and, more specifically, the Eleventh Circuit's

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[4]See, 20 C.F.R. Part 404, subpart B, Appendix 2, §202.00(a), 203.00(a).

holding that age was, "...an adjudicative factor and therefore must be given individual consideration through adjudication rather than legislative resolution through rule making."

Given this, petitioner's overly broad and conclusory statement in brief that, "..., a reversal in Campbell would cast serious doubt on the correctness of the decision in this case" (petitioner's brief at pg. 8) is not only misleading, but incorrect.

However, for the sake of argument, and assuming that both Campbell and Broz, supra, draw into question the Secretary's rule making powers viz-a-viz the "grid system", much broader distinctions between the two decisions (which petitioner would have us believe are inharmonious with one another) become manifestly apparent:

(a) Burden Shifting

The Second Circuit in Campbell, supra noted that, [t]he central issue in this case is whether the guidelines provide adequate evidence of a claimant's ability to perform a specific alternative occupation." (Emphasis supplied). 665 F.2d at 53. In holding that the Secretary did not meet his burden by super-imposing the occupational list contained in the grid system on an individual claimant, without giving that claimant specific alternative occupations which he/she allegedly could perform, the Court's decision was tantamount to a holding that the grid system in this regard was facially infirm.[5]

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[5]Citing with approval, Bastien v. Califano, 572 F.2d 908, 912-13

Contrawise and as previously noted, the Eleventh Circuit found that the occupational list constituted a legislative or non-adjudicative set of facts clearly within the rule making power of the Secretary. In this regard, the Court concluded that;

> "[t]he regulations remove from adjudication only 'the kinds and numbers of jobs that exist in the national economy and their skill and exertional requirements'... [and] in large part, then, the regulations properly allocate legislative and adjudicative facts between rule making and the hearing."

(b) Age:

Simply put, no challenge of the grid's age brackets or their resulting effects upon eligibility or ineligibility for benefits was raised in Campbell or dealt with in that decision. Admittedly, and as previously noted, that is the focal issue at bar. However, unlike Campbell, supra which apparently found facial infirmities in the grid to the extent it related to occupational lists, the decision appealed from here only struck down the age criteria as applied to the individual respondents:

> ""because the ALJ applied [age factors] in these cases to determine conclusively these claimants' abilities to adapt to new work, the cases must be remanded for individual consideration of this factor."

Moreover, the Court refused to tamper with or invalidate the regulations relating to age or to decide how individual

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(2nd Cir. 1978); Decker v. Harris, 647 F.2d 291, 298 (2nd Cir. 1981); Parker v. Harris, 626 F.2d 225, 233-34 (2nd Cir. 1980).

considerations of the age-adjustment factor should be accomplished by ALJs. Indeed, the Court noted no fewer than two (2) means of application of the regulations as written which would result in proper non-appealable final administrative adjudications of disability claims.[6]

A commonly accepted basis for the granting of writs of certiorari is where there exists conflicting opinions among various circuit courts of appeal.[7] Petitioner, however, has not, indeed cannot, point to a single decision of any circuit court of appeals which is directly in conflict with the relatively narrow holding below. Moreover, the issue which petitioner would have this Court grapple with by granting a writ of certiorari is neither important, novel, or one of a recurring nature, and, accordingly, the granting of the writ is neither

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[6]First, where claimant's dexterity is shown to be restricted preventing him from performing a full range of sedentary work, then the corresponding sedentary grid simply has no application and the case can be decided under general guidelines. Similarly, if a claimant has a non-exertional impairment significantly limiting his work skills, then again the grids have no application. See also, Fogg v. Schweiker, unrptd., Docket No. 81-1232 (1st Cir. Oct. 13, 1981), where the Court noted another scenerio which would imbue facial validity to the age factors: "A claimant is free to show any discernable exertional or non-exertional impairment. If the effects of premature aging for an individual should rise to the level of a demonstrable or measurable exertional or nonexertional impairment, there is no bar to the introduction and consideration of evidence related to that impairment."

[7]E.g., Tidewater Oil Co. v. U.S., 409 U.S. 151, 93 S.Ct. 408, 34 L.Ed.2d 375 (1972) (Expediting Act); Hanover Bank v. C. I. R., 369 U.S. 762, 82 S.Ct. 1080, 8 L.Ed.2d 187 (1962) (Internal Revenue Code); Scott v. Imigration and Naturalization Service, 385 U.S. 214, 87 S.Ct. 473, 17 L.Ed.2d 318 (1966) (Imigration and Naturalization Act); Hopkins v. Cohen, 390 U.S. 530, 88 S.Ct. 1146, 20 L.Ed.2d 87 (1968) (attorneys fees under Social Security Act); Snyder v. Harris, 394 U.S. 332, 89 S.Ct. 1053, 22 L.Ed.2d

appropriate or necessary.[8]

As noted, the holding below does not invalidate any existing provisions of the Social Security Act, an regulations or guidelines promulgated by the Secretary pursuant thereto, or any procedures for the actual adjudication of disability claims before administrative law judges. Indeed, the continued efforts of the Secretary to seek judicial review of any and all lower court decisions allowing claimants to present testimony in support of their claims as it relates to adjudicative matters, must be perceived as an administrative decision on his part to restrict and retard the number of persons to be placed on the social security disability roles.

CONCLUSION

Based upon the foregoing points and authority of law, it is respectfully urged by respondents that petitioner's petition for writ of certiorari to the Eleventh Circuit be denied.

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319 (1969) (jurisdictional amount in controversy); Richards v. U.S., 369 U.S. 1, 82 S.Ct. 585, 7 L.Ed.2d 492 (1962) (Federal Tort Claims Act); Segel v. Rochelle, 382 U.S. 575, 86 S.Ct. 511, 15 L.Ed.2d 428 (1966) (bankruptcy).

[8]E.g., U.S. v. Stapf, 375 U.S. 118, 84 S.Ct. 248, 11 L.Ed.2d 195 (1963) (IRS Regulations); Reading Co. v. Brown, 391 U.S. 471, 88 S.Ct. 1759, 20 L.Ed.2d 751 (1968) (bankruptcy); Kussick v. United Fruit Co., 375 U.S. 731, 81 S.Ct. 886, 6 L.Ed.2d 56 (1961) (maritime law); Costella v. Imigration and Naturalization Service, 376 U.S. 120, 84 S.Ct. 376, 11 L.Ed.2d 559 (1964)(Emigration & Naturalization Act).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have on this the 15th day of March 1983, served a copy of the above and foregoing Anne Buxton Sobol, Assistant U.S. Attorney General, Department of Justice, Washington D.C. 20530.

JOSEPH E. CARR, IV